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CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

Report of the Secretary-General

Addendum

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NETHERLANDS

[Original: English]

[29 September 1992]

A. Introduction

1. The Government of the Kingdom of the Netherlands welcomes the opportunity provided by General Assembly resolution 46/55 of 9 December 1991 to submit written comments and observations on the draft articles on jurisdictional immunities of States and their property adopted by the International Law Commission.

2. In principle the Government of the Netherlands supports the conclusion of the International Law Commission that the time is ripe for the organization of a diplomatic conference to examine the articles on jurisdictional immunities of States and their property. At the same time, however, the Government considers it necessary to make a more detailed assessment of the impact which recent international political developments have had on State immunities.

3. In this contribution, the Government of the Netherlands will confine itself to commenting on a number of the main features of the draft of the International Law Commission. It reserves the right to comment at a later stage on other elements of the draft.

B. Concept of State immunity

4. Article 5 constitutes one of the key provisions of the draft of the International Law Commission. As such, it should play a significant role in the consultations advocated above. The responses of various countries to the first draft devoted considerable attention to this article. With regard to the concept of State immunity, the Government of the Netherlands adheres to the principle of equality before the law for all legal persons, including States. A consequence of this is that States may invoke immunity only in a limited number of cases. A balance must be sought between those areas in which States may invariably invoke immunity (laid down in what might be called a "positive list") and areas in which it is irrelevant whether one of the legal persons concerned is a State. In the opinion of the Government of the Netherlands, a basic minimum, consisting of a positive list of areas which fall under State immunity, possibly supplemented by individual declarations from States concerning additional areas in which immunity may be invoked, would offer the best chance of general acceptance of the draft and further development of international law.

C. Concept of a State

5. In the view of the Government of the Netherlands, the concept of a "State", as defined in article 2, paragraph 1 (b) is too broad. Although listing the organs or entities which may be included in the definition of a State may have the advantage of clarity, in the present case it leads to too broad a category of organs and entities which, under certain circumstances, may invoke immunity. Furthermore, the list would appear to lead to a sort of reversal of the burden of proof whereby an entity appearing in the list is considered to be acting as a State unless the opposite can be proved. In practice, however, for certain entities the reverse will be true and only in exceptional circumstances can they be deemed to be States. In the opinion of the Government of the Netherlands, a more general definition, clearly expressing the principle that the entity concerned is acting on behalf of the State in exercising "la puissance publique", would be preferable.

D. Concept of a commercial transaction

6. The term "commercial transaction" may give rise to numerous problems of interpretation. In the draft of the International Law Commission it is, to a certain extent, defined tautologically and, furthermore, so broadly that, in principle, any contract concluded by a State - with the exception of a contract of employment - comes within the definition. It can hardly be expected that the tests laid down in paragraph 2, and especially the second test ("its purpose should be taken into account if, in the practice of the State which is a party to it, that purpose is relevant to determining the non-commercial character of the contract or transaction"), will have any limiting effect on the interpretation and scope of the term "transaction". In the opinion of the Government of the Netherlands, this second test should be dropped, as several States have suggested in their responses to the first draft.

E. Other issues

7. In the view of the Government of the Netherlands, it would be preferable to make the articles inapplicable to all questions relating to the immunity of ships, since, when problems arise in that field, recourse may be had to the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, concluded in Brussels in 1926. 1/

8. Article 18, which concerns measures of constraint, is confined to measures directed against state property. It is unclear to the Government of the Netherlands whether this implies that a State may invoke immunity if, for example, it seems likely that a recognizance will be imposed on it as a result

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1/ League of Nations, Treaty Series, vol. 176, No. 4062, p. 199.

of interlocutory injunction proceedings. In the Government's view, that would represent an undesirable expansion of the number of situations in which state immunities could be invoked.

9. Finally, the Government of the Netherlands would direct the attention of the International Law Commission to the problem of possible state bankruptcy. The Commission has pointed out that, in recent years, discussions have regularly been held on the desirability and/or possibility of declaring States bankrupt. In the opinion of the Government the question of whether that issue can be included in a convention on state immunities and, if so, in what way, requires further study.